

CAUSE NO. 2019-06610

JANE DOE

VS.

**BRENNANS OF HOUSTON, INC. d/b/a
BRENNANS OF HOUSTON**

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IN THE DISTRICT COURT OF

HARRIS COUNTY, TEXAS

80TH JUDICIAL DISTRICT

**DEFENDANT BRENNANS OF HOUSTON, INC.
d/b/a BRENNANS OF HOUSTON'S
FIRST AMENDED ANSWER**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, **BRENNANS OF HOUSTON, INC. d/b/a BRENNANS OF HOUSTON**, Defendant in the above-entitled and numbered cause, and files this its First Amended Answer in response to the Plaintiff's Second Amended Petition or other live pleading, and would respectfully show unto the Court as follows:

I.
GENERAL DENIAL

Pursuant to Rule 92 of the Texas Rules of Civil Procedure, Defendant denies each and every, all and singular, the material allegations contained in Plaintiff's Second Amended Petition, or other live pleading, and demands strict proof of Plaintiff's claims and allegations by a preponderance of the credible evidence or by such greater burden of proof as may be imposed under the laws and Constitution of the State of Texas.

II.
VICARIOUS LIABILITY CLAIMS UNTENABLE FOR INTENTIONAL TORTS

Pleading further, and without waiver of the foregoing, if a person or persons sexually assaulted Plaintiff, or committed other criminal acts against Plaintiff (which allegations have not

been admitted by any party or person, and which allegations, upon information and belief, have been denied), then such criminal and intentional act or acts were not committed by an employee of this Defendant acting in the course and scope of employment for this Defendant. Therefore, this Defendant cannot, as a matter of law, be held liable to Plaintiff under a vicarious liability theory, including but not limited to under the doctrine of *respondeat superior*, for the alleged criminal and intentional act(s) of others.

III. PREEMPTION BY DRAM SHOP ACT'S EXCLUSIVE REMEDY PROVISION

Pleading further, and without waiver of the foregoing, Defendant would show that Plaintiff's common law causes of action and/or theories of recovery against this Defendant premised upon this Defendant's alleged over-service of alcohol to Plaintiff are preempted and/or barred by the exclusive remedy provision of Section 2.03 of the Texas Alcoholic Beverage Code. *See*, TEX. ALCO. BEV. CODE §2.03; *F.F.P. Operating Partners, L.P. v. Duenez*, 237 S.W.3d 680, 687 (Tex. 2007).

IV. PRECLUSION OF EXEMPLARY DAMAGES

Pleading further, and without waiver of the foregoing, Defendant would show that Plaintiff is not entitled to recovery of exemplary and/or punitive damages against this Defendant, in that: 1) exemplary and/or punitive damages are not recoverable for an alleged violation of the Dram Shop Act, which statutory cause of action is Plaintiff's exclusive remedy for claims premised upon this Defendant's alleged over-service of alcohol to Plaintiff; and, 2) exemplary and/or punitive damages are not recoverable against this Defendant for any harm to Plaintiff resulting from the alleged criminal act(s) of others, including the alleged aggravated sexual assault, sexual assault, assault, and/or battery offenses Plaintiff claims were committed by now former employees of this

Defendant. *See*, TEX. CIV. PRAC. & REM. CODE §41.005(a)(c); *Borneman v. Steak & Ale of Tex., Inc.*, 62 S.W.3d 898, 908 (Tex. App. – Fort Worth 2001, no pet.).

**V.
PAID VS. INCURRED HEALTHCARE EXPENSES**

Pleading further, and without waiver of the foregoing, to the extent Plaintiff's alleged past medical expenses exceed the amount actually paid on such Plaintiff's behalf, Defendant asserts the applicability of Section 41.0105 of the Texas Civil Practice & Remedies Code. Therefore, the recovery, if any, of medical or healthcare expenses incurred by Plaintiff is limited to the amount actually paid by or on behalf of Plaintiff.

**VI.
LIMITATION ON ANY RECOVERY OF CERTAIN ALLEGED ECONOMIC DAMAGES**

Pleading further, and without waiver of the foregoing—and to the extent that Plaintiff is alleging lost wages or loss of earning capacity as a result of the incident(s) and/or occurrence(s) in question—this Defendant would show that such recovery, if any, is limited to post-tax earnings or net earnings figured pursuant to Section 18.091 of the Texas Civil Practices and Remedies Code and other applicable statutes and/or case law.

**VII.
LIMITATIONS ON ANY RECOVERY OF EXEMPLARY AND/OR PUNITIVE DAMAGES**

Pleading further, in the alternative, and without waiver of the foregoing, Defendant would show that any recovery of exemplary damages against this Defendant is subject to the provisions of TEX. CIV. PRAC. & REM. CODE §41.008, (“Limitation on Amount of Recovery”). Defendant further alleges, without waiver of the foregoing, that under Texas law, pre-judgment interest may not be assessed or recovered on an award of exemplary damages. *See*, TEX. CIV. PRAC. & REM. CODE §41.008.

VIII.

CONSTITUTIONAL LIMITATIONS ON ANY AWARD OF EXEMPLARY AND/OR PUNITIVE DAMAGES

Pleading further, in the alternative, and without waiver of the foregoing, Defendant would show that any award of exemplary and/or punitive damages against this Defendant would violate the due process clause of the Fifth Amendment and Fourteenth Amendment to the United States Constitution, in addition to Article 1, Section 19 of the Texas Constitution, in that:

1. Such punitive damages are intended to punish and deter the Defendant and thus this proceeding becomes essentially criminal in nature;
2. This Defendant is being compelled to be a witness against itself in a proceeding that is essentially and effectively criminal in nature, in violation of this Defendant's right to due process, and in violation of the Constitutions of the United States and of the State of Texas;
3. Plaintiff's burden of proof to establish punitive damages in this proceeding, which is effectively criminal in nature, is less than the burden of proof required in all other criminal proceedings, and thus violates the Defendant's right to due process as guaranteed by the Fourteenth Amendment of the United States Constitution and the rights of Defendant under Article 1, Section 19 of the Texas Constitution; and,
4. Inasmuch as this proceeding is essentially and effectively criminal in nature, this Defendant is being denied the requirements of adequate notice of the elements of the offense, and that such statutory and common law theories purportedly authorizing punitive damages are sufficiently vague and ambiguous, and Plaintiff's Petition purporting to invoke such statutory and/or common law theory is so vague and ambiguous as to be in violation of the due process clause of the Fourteenth Amendment to the United States Constitution and in violation of Article 1, Section 19 of the Texas Constitution.

IX.

RESERVATION OF RIGHT TO AMEND AND/OR SUPPLEMENT DEFENDANT'S PLEADINGS

Defendant respectfully reserves the right to amend this its First Amended Answer to the Plaintiff's allegations after this Defendant has had the opportunity to more closely investigate Plaintiff's claims as it is the right and privilege of this Defendant to do so under the Texas Rules of Civil Procedure and the laws of the State of Texas.

IX.
JURY REQUEST

Defendant reasserts Defendant's prior request for a trial by jury of all issues.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Defendant, **BRENNANS OF HOUSTON, INC. d/b/a BRENNANS OF HOUSTON**, prays that it go hence without day, for recovery of its costs incurred, and for such other and further relief, both special and general, at law and in equity, to which this Defendant may show itself to be justly entitled.

Respectfully submitted,

BROTHERS ALVARADO, P.C.

By: /s/ Karen M. Alvarado

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**Attorneys for Defendant,
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Brennans of Houston**

CERTIFICATE OF SERVICE

I certify that a true and correct copy of *Defendant Brennans of Houston, Inc. d/b/a Brennans of Houston's First Amended Answer* was served upon all other counsel of record in compliance with Rule 21a of the Texas Rules of Civil Procedure on this the 16th day of April, 2019, as follows:

VIA E-SERVICE

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